بسم الله الرحمن الرحيم

## Al Qawaa'ed Al Fiqhiyyah: The Maxims Governing Islamic Law

Maqaasid Shari'ah is like someone who is driving somewhere and the destination is the maqaasid shari'ah. The path you are going along is qawaa'id fiqhiyyah. The vehicle you are driving are the fiqh. On the way, there are some regulations, and those are usool al fiqh.

## Chapter 1: Definitions

Qawaa'ed:

Linguistic definition:

1. The tri-literal root of qawaa'ed is qa'ada, which has the meaning of fixation, consistency, and to become well established. When someone sits on the floor, it is called qa'ada because he is established and fixated.

   "Such elderly women as are past the prospect of marriage..." [Surah Al Nur v. 60] A woman from the qawaa'ed is very well established and in menopause and is past the childbearing age. She is established in the new fixed situation.

2. Qawaa'ed is a plural of qaa'ada, which means:

   a. The base and foundation of a structure.

      Allah (subhanahu wata'ala) says: "And remember Ibrahim and Isma'il raised the foundations of the House..." [Al Baqara 2:127]

   b. Rule and principle. The term principle is a common term used to explain the technical, juristic qaa'ada.

   c. Model and pattern. A model is something you use and relate everything to. The qawaa'id fiqhiyyah are like models and many rules of fiqh can fit under the principle. The pattern is consistent. The principles repeat.

Technical definition:

Qaa'eda

- A general rule of fiqh (jurisprudence) which applies to all of its related particulars. General rule means that it gives a general meaning but not necessarily an exclusive meaning or inclusive meaning. There will always be some exceptions to a general rule.

- A primary and comprehensive juristic maxim, which governs a set of secondary rules that fall under its exclusive principle. There are many rules that fall under the juristic maxim. There

are two categories of the rules: primary and secondary. All of them fall under exclusive principles.

Fiqhiyyah

Linguistic definition:

1. The tri-literal root of fiqhiyyah is fa-qaf-ha.
2. The term fiqh means the proper understanding of what is intended.

The Prophet (sal Allahu alayhi wa sallam) said: If Allah (subhanahu wata'ala) wills good for someone, He will give them the proper understanding of this deen."

Technical definition:

Fiqh

"To have the proper knowledge and understanding of the practical juristic rules derived from their detailed legal evidences." Examples of practical juristic rules: salah, fasting. Saying that fasting is obligatory on a person, then that is fiqh. These are not theoretical rules. The ayah of the Quran that makes salah obligatory is the detailed legal evidence.

Examples of Waqaa'id Fiqhiyyah

1. Every matter that is considered (legally) good is halal. This is general because there will be some good matters that are not halal because they lead to long term harm and therefore will be prohibited. Regarding food: every food that is not harmful is considered halal.

2. Every matter that is considered (legal) harmful is haraam.

3. Every (unbearable) hardship in Islam is eliminated

4. Contracts are considered binding by the intentions behind them not the actual phrasing and wording of the contract itself. Is the contract the actual phrasing or what was intended? For example, if one man goes to a friend who is selling chocolate and does not have money, so in exchange leaves his watch until he brings back money, then this is considered an exchange. It is not an amanah because you cannot come any time and ask for the watch back. It is a contract of a trust – you are entrusting him with the watch. Amanah means it can be claimed back at any time. The money must be brought before receiving the watch back. The intention is followed (not what they said).

   This can also be applied to marriage. If a man says he will give his daughter as a gift, and the man says he accepts it, then what does it mean? The one who says he accepts can go and contract her with someone else because she is a gift if taking it by the language. We would think that the man intended giving his daughter as a wife to the man.

## Chapter 2: Categories of Qawaa'id

The difference between qawaa'id fiqhiyyah and other qawaa'id.

Qawaa'id Fiqhiyyah

1. Qawaa'i fiqhiyyah are theoretical abstractions, usually in the form of short epithetical statements that are expressive, often in a few words, of the goals and objectives of the law.

   Of the most important qawaa'id fiqhiyyah is just two words: things are judged by the intentions behind them. It is one of the five major principles of Islamic law.

   a. The legal maxims of fiqh are statements of principles that are derived from the detailed reading of the rules of fiqh on various themes.

   b. It deals directly with the actual practical rules of fiqh. There are different rules of fiqh that are scattered all over the place. The fuqaha formulated the maxims into short terminologies and put them under one principle. Al qawaa'id fiqhiyyah is a product of the fiqh itself.

      If someone is in salah and doubting if it is the third or fourth rak'ah, then the rule of fiqh is: The person goes by the third rak'ah because he is sure of the third and doubtful of the fourth.

      If someone wants to make salah and is wondering if he has wudu' or not, then go by the closest certainty. From the different segments of fiqh, the ulema realized that there must be a rule of fiqh that can have all of them under it: certainty is not out ruled by doubt. The fuqaha studied the different themes of fiqh: fasting, salah, criminal law, etc. They found consistency and uniformity in certain principles which were extracted and made into principles. Qawaa'id fiqhiyyah is the product of fiqh itself.

   c. The rule of the qawaa'id fiqhiyyah is the rule of majority; some exemptions always apply to them.

Qawaa'id Usooliyyah (Rules of the Theory of Law – this is related to usool al fiqh)

1. Qawaa'id usooliyyah are the theoretical principles of usool al fiqh that deal objectively with the theory of law independent from its actual practical rule. This means that it does not tell you that your salah is invalid if you laugh in salah – this is a fiqh problem. Also, it does not tell you that your contract is haraam if it has riba in it. It tells you why it is haraam.

2. The rule of qawaa'id usooliyyah unlike the qawaa'id fiqhiyyah is all-inclusive.

Examples of Qawaa'id Usooliyyah

- A command imposes obligation. This means any absolute command that does not have any clues to suggest otherwise is a command of obligation.

- The Sunnah of the Prophet (sal Allahu alayhi wa sallam) is an authoritative legal proof.

- If an obligatory act cannot take place without performing another, that other act becomes obligatory in itself. Example: if someone is capable, healthy, and able to go to Hajj then it is obligatory. If someone starts slacking from performing this waajib, then he becomes sinful. If going for Hajj requires you to go and do something, then that something becomes waajib on you. For example, buying an airline ticket is mubaah, but Hajj is waajib and buying the airline ticket must be done.

Qawaa'id Nah'wiyyah (Rules of Grammar) / Lughuwiyyah

1. Qawaa'id are rules of the Arabic grammar and form of speech
2. It mainly identifies the grammatical position of a speech in the Arabic language and its linguistic implication
3. The rule of qawaa'id nah'wiyyah is all inclusive

   Examples:

   - The subject in a sentence always holds a nominative case.
   - Tanween is an exclusive sign to identify a noun.
   - Arabic words neither begin with a consonant nor end with a vowel point

Q&A: Qawaa'id fiqhiyyah tells you how something is haraam and qawaa'id usooliyyah tells you why. If a man is praying and wearing a golden ring, according to Imam Abu Hanifah, the salah is baatil (invalid). The principle of fiqh is because prohibition overrules the command. Usool al fiqh tells you how to recognize what is a prohibition and what is a command.

Qawaa'id Mantiqiyyah (Rules of Logic)

These started with buzz statements and then became a reality in Islamic science.

1. Qawaa'id mantiqiyyah are rules of logic and reason and principles of critical, and sometimes philosophical thinking.
2. The rule of qawaa'id mantiqiyyah is disputed between rule of majority or all-inclusive.

   Examples:

   - The first spark of the idea is the last of the work and at the end of the idea lays the beginning of the work. For example: if someone says he wants you to build a house, in those seconds of silence, what came to mind? The image of a house already built. What is the first thing to do before building? A plan and finances and paperwork.
   - Every human is an animal (mammal), hence, some mammals (as species) are humans.
   - All that has a start must have an end. This is not always true: Allah (subhanahu wata'ala), Jannah has no end but it has a start because it is the creation of Allah.

- Energy does not cease to exist and something has to produce it. As Muslims, we believe that this applies to matter only. We believe that Allah (subhanahu wata'ala) created from nothing.

These logical rules created a lot of fitnah for the Muslims. The Mu'tazilah were buzzing with statements, and Imam Ash Shafi'ee was asked about ilm al kalam, and he said they should be carried on donkeys sitting backwards and be beaten with palm tree leaves and it should be said that they are those abandoning the Quran and Sunnah. Neither the fool nor intelligent will benefit for this. Logical rules were later incorporated.

### **Chapter 3: Categories of Qawaa'id Fiqhiyyah** (kulliyah / asliyyah)

1. Nominative (comprehensive – primary) qawaa'id

   Under each of these are many sub-rules. These are the five that you need to memorize.

   These are the five comprehensive maxims governing fiqh and Islamic law on which there is unanimous agreement among the different madhabs.

   - Acts are judged by the intentions behind them. When we see something, we shouldn't immediately judge by the action itself. Intention is very important.

   - Certainty is not overruled by doubt. If you are certain of something, you cannot change that certainty because of mere doubt. We assume presumption of continuity.

   - Hardship begets facility / hardship brings about ease. If someone is traveling and lacks water, then he makes tayammum.

   - Harm must be eliminated.

   - Custom is the basis of judgment / Custom rules. If two individuals argue about the meaning of a contract, then go by the tradition of the marketplace. For example, if someone from Palestine goes to Egypt and finds nice factories of *laban* (yogurt) and makes a contract to buy $100,000 of *laban*, but when he returns home, he finds that he has received *haleeb* (milk), which the Egyptians calls *laban*. Which one should be observed? Custom rules.

2. Supplementary (Secondary) Qawaa'id

These are less comprehensive qawaa'id upon which there is unanimous agreement, some fall under the primary ones but others do not.

Examples:

- Profit follows responsibility. For example: if you borrow someone's car, you should use it for it was made for. A man borrows a car and drives from Houston to Dallas and takes some people who pay for the trip. The owner sees him receiving payment for using the car and asks for half of the profit. The money is all halal to the one who borrows the car because if

something were to happen to the car, then he would be liable for it. What if the car is brought back in a bad condition? The borrower is liable for any damage.

- A ruling of ijtihaad is not reversed by its equivalent. If a judge rules against someone and there is no ayah or hadeeth to support that judgment or negate the judgment, then the judge makes his judgment based on rational evidences. Some time later, another judge at the same level or less sees the same case and disagrees with the outcome, then he cannot reverse the judgment unless there is a real serious flaw in the initial ijtihaad (i.e. initial ijtihaad was based on false evidence / wrong to begin with). It can be overruled by a higher court. The mujtahid himself cannot overrule his ijtihaad that was based on another ijtihaad.

  There was a dispute over inheritance law during the time of Umar (radhi Allahu 'anhu). Individuals came to Umar (radhi Allahu 'anhu), and half brothers receive the left over from the inheritance after the divisions were made. Sometimes, half brothers from the mother's side receive more than the half brothers from the father's side, which is illogical. In this case, Umar (radhi Allahu 'anhu) made ijtihaad and the paternal brothers had nothing left over. On another occasion, a group had the same scenario and he ruled the same way. The group presented evidence that was not clear to him before. They said: let's assume our father was a donkey or rock, don't we share the same mother? Therefore, he gave them a share like being maternal brothers. The people of the first case heard of this and came back to Umar who told them that their case was closed and future cases would be based on the new ijtihaad.

- The attachment follows the principle. If you buy a house and sign the contract and after moving into the house do not see what you had seen before in the house. The people had taken the doors, windows, and chandeliers with them. It is assumed that these things should come with the house.

3. Exclusive (Madhabi) Qawaa'id

These are qawaa'id produced exclusively by a particular school of thought (madhab) and not necessarily approved by jurists of other schools of thought.

Example according to the Maliki madhab: Every solid matter that neither is an intoxicant nor of an animal source is tahir (pure).

In some opinions of fiqh, idols are physically najas but not in the Maliki school. The Hanbali school says that these are najas, and it is forbidden to buy and sell in them.

4. Limited Qawaa'id

These qawaa'id are known as dhabit(s) or controllers, they are limited in scope, and control only the particulars of a single theme or chapter of fiqh, such as taharah. [In the Arabic language, dhabit refers to a police officer because he is also the controller]

Examples:

When the water reaches (qullatayn), it does not carry filth. Qullatayn is the height of two to three feet of a one meter by one meter shape. This opinion is popular in the Shafi'ee school. This principle speaks about the chapter of purification and particularly water. This rule cannot be applied to salah or Hajj or fasting. It can only be applied to taharah.

## Chapter 4: Status of Qawaa'id in Islamic Law

1. Significance of qawaa'id

   - Qawaa'id fiqhiyyah are considered supplementary proofs of fiqh, not primary proofs, and therefore can only be used as persuasive evidences.
   - Major normative qawaa'id are used as legal proofs to establish a rule of fiqh when a clear legal evidence becomes absent.
   - Supplementary qawaa'id cannot be used as independent proofs to establish a new rule of fiqh.
   - The mufti or jurist must have extensive

2. The value of qawaa'id in Islamic law

   - Qawaa'id are considered broad guidelines for the jurists to go by
   - Qawaa'id are designed to facilitate a better understanding of the Shari'ah
   - A legal maxim is reflective of a consolidated reading of the fiqh
   - It brings together different rules of fiqh of different themes of Islamic law under one unifying maxim in an organized method.
   - It helps the faqih (jurist) to connect the different areas of Islamic law for the purpose of memorizing and studying.
   - It sharpens the skills of inference for the faqih or the student of fiqh.